



SIU Legal Clinic  
SIU School of Law  
Kaplan Hall  
1205 Douglas Drive, Mailcode 6821  
Carbondale, Illinois 62901-6821  
618-536-4423  
(FAX) 618-453-8727

## WILLS, LIVING WILLS, AND POWERS OF ATTORNEY

As you get older, it is natural and appropriate to think about what will happen in the event of a serious illness and what will happen after your death to the property you and your family have accumulated over the years. There are three primary legal documents which are relevant to a full understanding of your legal rights as older people.

### WILLS

A will is nothing more than a piece of paper signed and witnessed in a particular way in which you tell the people who survive you how you want your property disposed of. If you die without a will, your property will be divided up according to a procedure specified in the Illinois statutes. Under this formula a minimum of \$20,000 of your estate first goes to your surviving spouse, while the remainder of your property is divided between your surviving spouse and your children. If you have no surviving spouse, your property is then divided among your children. If one of your children has died before you, that child's share will go to his or her children. If you had no children, the property then goes to your parents, brothers and sisters, and so forth. Contrary to popular belief, your property would only very rarely "go to the state". Only property which you own by yourself passes under your will. Assets (including real estate and money in the bank) held in joint tenancy do not pass under the will and become the property of the surviving joint tenant immediately upon your death, even if you have given that property to someone else in your will.

While a will is always helpful, there are several circumstances in which it is essential. Most obviously, a will is required if you desire to leave any of your property to anyone other than your closest family. This means, for example, if you desire to leave a gift to the church, a friend, or a relative who would not share under the statutory formula, this must be done through a will. Similarly, you might also desire to leave a family member, such as a child, more or less of your estate than he or she would be entitled to under the statutory formula. This might be because one of your children is better off than others, may have special needs that require a larger gift, or may no longer be close to you so that you might desire to leave them nothing. These decisions are all entirely proper, but need to be made through a will. Another circumstance warranting a will is when you have remarried so that your new spouse has children from a previous marriage, you have children from a previous marriage, and you each have jointly held and individually held property. Under these circumstances a great deal of confusion and bad feelings can be avoided by visiting a lawyer and executing a will, and perhaps other legal documents, to clarify what will happen to your property and that of your new spouse upon your deaths. Executing a will also allows you to nominate the person you want to be the executor of your estate. This person performs the task of seeing that the wishes expressed in your will are carried out. Finally, you should see an attorney if your estate is large enough to generate estate or inheritance taxes. Generally speaking, there are no estate or inheritance taxes for an estate worth

less than \$1,000,000, but if you are approaching that level of assets, you are well advised to see an attorney who is knowledgeable in taxation and estate planning.

Almost any lawyer can draft a will for you. It is a fairly inexpensive procedure and can be done rather quickly. A will does not have to be written by a lawyer. If a will is written and witnessed by two individuals who do not have an interest in your estate, the will is probably valid, even if it is not typed and even if it is not drafted by a lawyer. On the other hand, it is always preferable to see an attorney who is knowledgeable about some of the technical aspects of will drafting which might be overlooked by a lay person. As noted above, there are some circumstances in which a will is essential. Even for people who do not fit within the categories specified, a will cannot hurt and might often avoid uncertainties as to what you want to have happen to your property after you are gone.

### LIVING WILLS

A will designed to give away your property becomes effective only when you die. A living will, as the name implies, has to do with things that happen during your lifetime. Generally speaking, a living will is a document which you would sign stating that if you are the victim of a terminal illness, you do not want your life prolonged by heroic measures such as "breathing machines". This is a straight forward document which follows language specified in the Illinois statutes. It is signed the same way as a regular will, meaning it needs to be witnessed by two people who have no interest in your estate and who are not providing you with any care or treatment.

If you have a terminal condition and your death is "imminent", and if you are receiving the types of treatment covered by the Illinois Living Will Act, you can direct that your physician withdraw or withhold such procedures and that you be allowed to die naturally and with dignity and not have your life prolonged. A living will in no way authorizes anyone to hasten your death, but only to allow your death to occur naturally without the emotional strain and financial cost of heroic life prolonging procedures.

A living will can also be drafted by an attorney, but the specific language of the living will is statutory so that you can obtain blank copies of living wills from various agencies and complete them yourself, and the document is valid so long as it is properly witnessed.

Under Illinois law, a living will has very limited value. First, in order for a living will to be used you must have an incurable and irreversible condition which is such that death is imminent. Secondly, in Illinois a living will can only be used to withhold or withdraw such procedures as assisted breathing, artificial kidney treatments, intravenous medication, or blood transfusions. Very few people have the type of condition and treatment which would be aided by a living will. For the large majority of the population a Durable Power of Attorney for Health Care would be much better than a living will.

### POWERS OF ATTORNEY

A Durable Power of Attorney is a much more powerful instrument which generally is preferable to a living will because it can provide for a wide range of situations that may arise as you get older. A Power of Attorney has nothing to do with an attorney at law. Rather, a Power of Attorney is a written document by which you appoint an agent to act in your place. This agent is known as an "attorney in fact". Any competent adult can be an "attorney in fact"; such a person does not have to be a lawyer.

The Illinois legislature adopted a Durable Power of Attorney statute which creates two different documents for various purposes. The first such document is a **Power of Attorney for Health Care**. In this document you would designate a person who can make a full range of medical decisions on your behalf. This could include consent to medical treatment, admission to the hospital, admission to long-term care facilities, disposition of your body subsequent to your death, and virtually any type of health care decision that would have to be made. In a Power of Attorney for Health Care you may also express your desires regarding what should happen to you if you have a terminal illness and are maintained

only through heroic means. You may also designate whether you desire to be an organ donor at the time of your death. **In this respect, a Power of Attorney for Health Care is quite similar to a living will, but it is a much broader and more powerful instrument which not only considers a terminal illness, but also provides for what should happen in a whole range of situations that may arise as you get older.** A Power of Attorney for Health Care may become effective immediately or you can provide that should only become effective if your physician or more than one physician certifies that you are no longer able to make these decisions yourself.

The second type of power of attorney authorized in the new Illinois statute is a **Power of Attorney for Property** by which you would authorize someone to make decisions regarding your property. For example, you could authorize someone to deposit and withdraw money from your bank account, transfer real estate, deal with insurance, pay your bills, and make other types of business transactions and decisions. You can limit the scope of the power of attorney to specific types of transactions or you can make the power as broad as you like. Again, the power can be effective immediately or only upon a certification of a physician.

Clearly, powers of attorney are important tools to be considered by older people who are concerned with what will happen in the remainder of their lives. Most attorneys are familiar with powers of attorney and how they can be useful. It is important to recognize that a person must be mentally competent when he or she signs a Power of Attorney. Once a person becomes incompetent, he or she can no longer execute a Power of Attorney. However, if the person was competent when the durable power of attorney was signed in the first place, it remains valid for the remainder of that person's life.

#### **AVAILABILITY OF LEGAL SERVICES**

**There is no substitute for individual legal advice.** The preceding information speaks only in general terms. Each individual situation must be independently analyzed by an attorney,

knowledgeable of these issues. If you have a private attorney, you should certainly discuss these matters with him or her. If you do not have a private attorney, the Illinois State Bar Association maintains a lawyer referral service which you can contact for the name of a lawyer in your area. The number for the Illinois Lawyer Referral Service is 1-217-525-5297. Their website is [www.illinoislawyerfinder.com](http://www.illinoislawyerfinder.com) The Legal Clinic at Southern Illinois University School of Law provides legal assistance to persons age 60 and over who live in the thirteen southernmost counties of Illinois. The program sees clients at fifteen sites throughout southern Illinois. This program can provide you with legal services. To find out about the Legal Clinic's services contact the senior citizen nutrition site closest to your home or contact the Legal Clinic at 1-800-673-6130.

(revised 8/2010)

C:\Documents and Settings\siu850564737\My Documents\Wills.wpd